Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Apdal & Ors

HIGH COURT (KOTA KINABALU) — SUIT NO K-23–05 OF 1998
HAMID SULTAN JC
5 SEPTEMBER 2008

Civil Procedure — Writ of summons — Indorsement, special — Indorsement of claim in defamation action — Failure to indorse — Whether such failure fatal — Rules of the High Court 1980 O 78

Tort — Defamation — Damages — Assessment of — Circumstances to be taken into consideration

Tort — Defamation — Qualified privilege — Whether privilege attached to reporting of public events — Whether news organisation proved its report was fair and accurate reporting — Whether defence of qualified privilege to be liberally construed in favour of news organisations — Defamation Act 1957 s 12(1), (2) & Schedule Part 2

Words and Phrases — 'News' — Definition of

The plaintiff was a well known politician and the former Chief Minister of Sabah. The first defendant — an MP and political secretary — had made certain remarks against the plaintiff at a public meeting and/or event. The remarks were published in an article written by the fourth defendant the next day in the *Berita Harian* — a newspaper owned and/or published by the second defendant, with the third defendant as its editor and the fifth defendant its printer. The plaintiff alleged that the remarks and article had defamed him. He sued the defendants for defamation claiming, inter alia, damages exceeding RM40m. The action against the first defendant was settled out of court before trial. At the trial, the second to fifth defendants only relied on the statutory defence of qualified privilege under s 12 of the Defamation Act 1957 ('the Act'). It was not disputed that the second defendant had, at the earliest opportunity, offered to publish statements from the plaintiff in the *Berita Harian* so as to afford the plaintiff sufficient and adequate opportunity to explain and/or contradict the words complained of. However, the plaintiff had not taken up the offer.

Held, allowing the plaintiff's claim on the merits:

(1) The plaintiff had failed to indorse his writ in the manner required by O 78 r 2 of the Rules of the High Court 1980. Such failure was fatal since O 78 was a specific provision and constituted a condition precedent to the issue of a writ of defamation. The plaintiff's suit could be dismissed on this ground alone but since the defendants had not objected at the commencement of the proceedings, the High Court would proceed to hear the case on the merits (see para 7).

(2) The words complained of were indeed defamatory of the plaintiff. The High Court could not agree with the plaintiff's contention that the statutory defence of qualified privilege did not apply to a reporting of a public meeting under Part 2 of the Schedule to the Act (see para 9).

(3) The defendants were entitled to the statutory defence of qualified privilege. In the instant case, the defendants were news publishers. Their rights, privileges, immunities were quite different from commercial organisations or private persons. Newspapers are ordinarily expected to report contemporary events of public interest or of public concern, which is often liberally construed by the courts (see para 10(iii)).

(4) The word 'news' is defined by *The Concise Oxford Dictionary* as information about important or interesting recent events, specifically — as in the instant case — what a newsman sees or hears from an original source in relation to publication. The truth per se is not material but the fact that such things were said by the maker could give the news media the right to publish the same. However, the law will penalise certain category of news if published wrongfully (see para 10(iii)).

(5) In the instant case, the evidence and pleadings showed that there was indeed a public meeting. The definition of 'public meeting' under s 2 of the Act is not restrictively worded. It is the current judicial trend to give news organisations greater protection against libel actions (see para 10(iv)).

(6) In the instant case, the defendants had not satisfied the High Court that their article or report was a fair and accurate reporting as set out under Part 2 of the Act. Thus the plaintiff would succeed and the defendants' defence of qualified privilege would fail. The Act does not define 'fair and accurate reporting' and the defendants in the instant case had not shown that their reporting was fair and accurate. Merely, reporting matters which could prima facie be seen objectively as defamatory could not be said to be fair if the accuracy of the report was not verified by the publishers. In the context of responsible journalism, even though a statement was accurate there could be a duty to edit the report where

necessary to reflect fairness. It all would depend on the facts of the case, and the nature of the allegation (see para 10(v)).

(7) In assessing damages, the court may take into consideration the circumstances of the case and previous cases could only be a guide. In the instant case, the slanderous statement originated from the first defendant, against whom the matter had been settled. The defendants had also written a letter to afford the plaintiff sufficient and adequate opportunity to explain and/or contradict the words complained of but the plaintiff had not taken the offer. This showed the defendants' sincerity in correcting the error and to a certain extent destroyed any argument in respect of malice. The plaintiff had also failed to request the defendants to correct their report pursuant to s 12(2) of the Act. In the instant case, the plaintiff's quantum of damages was an unprecedented amount and unsupported by authority. A sum of RM50,000 instead would constitute a fair amount as damages (see para 10(vi)).

[Bahasa Malaysia summary

Plaintif merupakan ahli politik terkenal dan bekas Ketua Menteri Sabah. Defendan pertama — seorang MP dan setiausaha politik — telah membuat kenyataan tertentu terhadap plaintif di mesyuarat dan/atau peristiwa umum. Kenyataan tersebut telah diterbitkan dalam sebuah artikel yang ditulis oleh defendan keempat pada keesokan hari dalam *Berita Harian* — akhbar yang dimiliki dan/atau diterbitkan oleh defendan kedua, dengan defendan ketiga sebagai editornya dan defendan kelima sebagai pencetaknya. Plaintif mengatakan bahawa kenyataan dan artikel tersebut telah memfitnahnya. Dia telah menyaman defendan-defendan kerana fitnah dan menuntut, antara lain, ganti rugi melebihi RM40j. Tindakan terhadap defendan pertama telah diselesaikan di luar mahkamah sebelum perbicaraan. Semasa perbicaraan, defendan kedua hingga kelima hanya bergantung kepada pembelaan statutori perlindungan bersyarat di bawah s 12 Akta Fitnah 1957 ('Akta'). Ia tidak dipertikaikan bahawa defendan kedua telah, pada peluang paling awal, membuat tawaran untuk menerbitkan kenyataan-kenyataan daripada plaintif dalam *Berita Harian* agar dapat memberikan plaintif peluang yang memadai dan memuaskan untuk menjelaskan dan/atau menyangkal perkataan-perkataan yang diadukan. Walau bagaimanapun, plaintif tidak mengambil tawaran tersebut.

Diputuskan, membenarkan tuntutan plaintif atas merit:

(1) Plaintif telah gagal mengindorskan writnya menurut cara yang dikehendaki oleh A 78 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980.

Kegagalan tersebut menjejaskan kerana A 78 adalah peruntukan spesifik dan membentuk pra syarat kepada isu writ fitnah. Guaman plaintif boleh ditolak atas alasan ini sahaja tetapi memandangkan defendan tidak membantah di awal prosiding, Mahkamah Tinggi akan terus mendengar kes atas merit (lihat perenggan 7).

(2) Perkataan-perkataan yang diadukan sememangnya berunsur fitnah terhadap plaintif. Mahkamah Tinggi tidak boleh bersetuju dengan penegasan plaintif bahawa pembelaan statutori perlindungan bersyarat tidak terpakai untuk laporan mesyuarat umum di bawah Bahagian 2 Jadual kepada Akta (lihat perenggan 9).

(3) Defendan-defendan berhak kepada pembelaan statutori perlindungan bersyarat. Dalam kes ini, defendan-defendan merupakan penerbit berita. Hak, keistimewaan, kekebalan mereka berbeza dengan organisasi komersial atau orang perseorangan. Surat khabar biasanya dijangka melaporkan peristiwa tentang kepentingan awam atau kebimbangan awam, yang sering ditafsirkan secara longgar oleh mahkamah (lihat perenggan 10(iii)).

(4) Perkataan 'news' didefinisikan oleh *The Concise Oxford Dictionary* sebagai maklumat tentang peristiwa terkini yang penting atau menarik, khususnya — seperti dalam kes ini — apa yang pemberita lihat atau dengar daripada sumber asal berkaitan penerbitan. Kebenaran semata-mata tidak penting tetapi hakikat bahawa perkara tersebut telah dikatakan oleh pembuat boleh memberikan media berita hak untuk menerbitkan yang sama. Walau bagaimanapun, undang-undang mengenakan denda untuk kategori berita tertentu jika salah diterbitkan (lihat perenggan 10(iii)).

(5) Dalam kes ini, keterangan dan pliding menunjukkan bahawa sememangnya terdapat mesyuarat umum. Definisi 'public meeting'; di bawah s 2 Akta tidak terbatas. Ia merupakan perkembangan kehakiman terkini untuk memberikan organisasi berita lebih perlindungan daripada tindakan libel (lihat perenggan 10(iv)).

(6) Dalam kes ini, defendan-defendan tidak memuaskan Mahkamah Tinggi bahawa artikel atau laporan mereka adalah laporan yang adil dan tepat seperti yang ditetapkan di bawah Bahagian 2 Akta. Oleh itu plaintif akan berjaya dan pembelaan perlindungan bersyarat defendan-defendan akan gagal. Akta tidak mendefinisikan 'fair and accurate reporting' dan defendan-defendan dalam kes ini tidak menunjukkan bahawa laporan mereka adalah adil dan tepat. Cuma, perkara yang dilaporkan yang dilihat secara objektif prima facie sebagai berunsur fitnah tidak boleh dikatakan sebagai adil jika ketepatan laporan tersebut tidak disahkan oleh penerbit-penerbit. Dalam konteks kewartawanan yang bertanggungjawab, meskipun kenyataan adalah

tepat terdapat kewajipan untuk mengedit laporan tersebut di mana perlu untuk menggambarkan keadilan. Semuanya bergantung kepada fakta kes, dan sifat pengataan itu (lihat perenggan 10(v)).

(7) Dalam menaksir ganti rugi, mahkamah boleh mempertimbangkan keadaan kes dan kes-kes terdahulu hanya boleh menjadi panduan. Dalam kes ini, kenyataan bersifat slander datangnya dari defendan pertama, di mana perkara tersebut telah diselesaikan. Defendan-defendan juga telah menulis surat untuk memberikan plaintif peluang yang memadai dan memuaskan untuk menjelaskan dan/atau menentang perkataan-perkataan yang diadukan tetapi plaintif tidak mengambil tawaran itu. Ini menunjukkan keikhlasan defendan-defendan memperbetulkan kesilapan tersebut dan setakat tertentu telah melenyapkan apa-apa hujahan berkaitan niat jahat. Plaintif juga gagal meminta defendan-defendan memperbetulkan laporan mereka menurut s 12(2) Akta. Dalam kes ini, kuantum ganti rugi plaintif merupakan jumlah yang tidak pernah wujud sebelum ini dan tidak disokong oleh autoriti. Sejumlah RM50,000 sebaliknya membentuk jumlah yang adil sebagai ganti rugi (lihat perenggan 10(vi)).]

Notes

For cases on assessment of damages, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 274–282.

For cases on qualified privileges, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 576–590.

For cases on special indorsement of writ of summons, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 8043–8047.

Cases referred to

Arab-Malaysian Merchant Bank Bhd v Dominance Resources Sdn Bhd & Anor [2001] 6 MLJ 715, HC (folld)

Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya'kub [2005] 3 MLJ 485; [2005] 2 CLJ 645, CA (refd)

Chaman v Orion Group Publishing [2007] EWCA Civ 972, CA (refd)

Chan Kow Chuan v Andrew Kok [2003] 3 AMR 456, HC (folld)

Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494, CA (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)

Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Ors [2007] 5 MLJ 339, HC (folld)

Datuk Patinggi Abdul Rahman Ya'kub v Abang Mohammad bin Abang Anding [1979] 2 MLJ 185, HC (folld)

DP Vijandran v Karpal Singh & Ors [2000] 3 MLJ 22, HC (refd)

Joceline Tan Poh Choo & Ors v V Muthusamy [2003] 4 MLJ 494, CA (refd)

Karpal Singh a/l Ram Singh v DP Vijandran [2001] 4 MLJ 161, CA (folld)
Lee Kuan Yew v Derek Gwyn Davies & Ors [1990] 1 MLJ 390; [1989] SLR 1063, HC (folld)
Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors [2001] 2 CLJ 385, CA (refd)
Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd [1990] 2 MLJ 423, HC (folld)
Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar [2001] 3 CLJ 161, CA (refd)
Tan Sri Dato Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors [1995] 1 MLJ 39, FC (refd)
Turkington & Ors (Practising as McCartan Turkington Breen) v Times Newspapers Limited (Northern Ireland) unreported, 2 November 2000 (refd)
Utusan Melayu (M) Bhd & Ors v Tjanting Handicraft Sdn Bhd & Anor [2005] 2 MLJ 397, CA (refd)

Legislation referred to

Defamation Act 1957 ss 2, 8, 12, 12(1), 12(2), 12(3), Schedule Part II
Defamation Act 1952 [UK] s 7(1)
Rules of the High Court 1980 O 1A, O 2 r 3, O 6 r 2, O 78 r 2, Form 2

Colin Lau (Colin Lau & Co Advocates) for the plaintiff.
Sugumar Balakrishnan Esq (Sugumar & Co Advocates) for the second, third, fourth and fifth defendants.

Hamid Sultan JC:

[1] This is my judgment in respect of the plaintiff's defamation suit against the second to fifth defendants. The action against the first defendant, a well known politician has been settled out of court. And the plaintiff claims against second and fifth defendants: (i) damages of up to RM25,000,000 for libel and slander; (ii) aggravated damages of up to RM10,000,000 for libel and slander; and (iii) exemplary damages of up to RM5,000,000 for libel and slander and against the third and fourth defendants: (i) damages of up to RM1,000,000 for libel and slander; (ii) aggravated damages of up to RM1,000,000 for libel and slander; and (iii) exemplary damages of up to RM1,000,000 for libel and slander.

[2] At the commencement of the hearing, parties have agreed that the case can be heard by way of: (i) witness statement for examination in chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for

agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-examination witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

BRIEF FACTS (THE PLAINTIFF'S VERSION)

[3] The plaintiff is a well known politician and once the Chief Minister of Sabah. At the material time, the second defendant was the owner and/or publisher of *Berita Harian*, the third defendant, the editor, the fourth defendant, the reporter and/or writer of the said defamatory article and the fifth defendant, the printer (defendants). On 20 June 1998, some statements made by the first defendant which were defamatory of the plaintiff were published in the *Berita Harian*. Paragraph 7 of the statement of claim particularly says the statement was made by the first defendant on 19 June 1998, at the People Rakyat Session or conference or meeting. The statement was published as an article written by the fourth defendant. And the English translation of the article read as follows:

Investigate land owned by ex Chief Minister

By Muhd Yusuf Abu Bakar

Pulau Banggi (Kudat), Friday — The state government had been asked to explanation to the residents of the state in relation to the transfer of the ownership of the land here which belonged to the government's agency, Sabah Cattle Farm to the ex-Chief Minister Sabah, Datuk Harris Salleh.

The Parliamentary Secretary to the Ministry of Information, Datuk Shafie Apdal said the government must investigate how did the ownership of government agency land measuring approximately 2,500 hectares which was allocated for dairy cattle farming had been transferred to an individual.

'The state government must give explanation to the residents of Pulau Banggi and the state in connection with the transfer of the land concerned to Harris who is now developing teak plantation in the area concerned' he said ...

He said this to *Berita Harian* after the visit to Pulau Banggi. Also present was the assistant district officer of Pulau Banggi, Nahalan Medunah.

The Berjaya Government led by Harris through the subsidiary company of Sabah Cattle Farm developed an area measuring of 2,500 hectares at Pulau Banggi for dairy cattle farming in the 70's, but it was not successful.

The abandoned area has been taken by Harris for teak wood plantation. This caused muttering among the residents concerning the status of the ownership of the land concerned.

According to him, many agricultural areas which were formerly owned by the government or its agency had been transferred to Harris, at the time he was leading the Berjaya Government.

Harris is currently leading party Barisan Rakyat Sabah Bersekutu (Bersekutu).

Shafie said, the state government must review the provision which allows the transfer of land belonging to government to individual, because it is a loss.

'The 2,500 hectares of land which could be divided to village residents is now owned by an individual only, this is certainly unfair' he said.

According to him the government must investigate into the said ex-Chief Minister as to how government land could simply owned by him.

'The said land has to be surrendered back to the government or he has to pay compensation in relation to the ownership of the said land' he said.

Meanwhile, a resident complained that a lodging company was carrying out illegal logging activities at Bukit Sinambung area, since last week.

He, who refused to have his name published, said there were a worker and 2 tractors illegally falling trees at water catchments area at Bukit Sinambung.

'Forestry Department need to take stern action against the company which involve and often carry out illegal logging activities, despite having been warned by the authority,' he said.

According to him, the logging company was using the village residents particularly the leader of the village to carry out the said activities.

The plaintiff says that the said article is defamatory in that the ordinary and natural meaning of the words complained of imputes that the plaintiff unlawfully had lands belonging to the state or state agencies, transferred to him including the 10,000 acres in Pulau Banggi and was therefore a dishonest and corrupt person or politician and should not be trusted. The defendants say that the occasion upon which the words were uttered by the first defendant was a public meeting and at that material time, the first defendant was a member of parliament and also Parliamentary Secretary to the Minister of Information. The words complained of in their natural and ordinary meaning are incapable of bearing any other meaning save as herein below stated, namely: (a) that it was a call made by the first defendant upon the state government to be accountable and transparent in alienating lands belonging to the state; (b) that it was a bona fide call made by the first defendant upon the state government to ensure that huge lands belonging to the state are not arbitrarily alienated to individuals at the expense of the public; (c) that pursuant to the grouses and/or complaints raised by the residents of Pulau Banggi to the assistant district officer, the first defendant made a bona fide call upon the state government to investigate the purported transfer of the said land by Sabah Cattle Farm to the plaintiff; (d) that the words complained of echoes were no more than a call made by the first defendant upon the state government to place public interest above anything else; and (e) that the words complained of were merely hypothetical, in that it requires the state government to verify the truth of the said words.

Further the defendants say the words complained of consists mere repetition and republication of statements made by the first defendant on an occasion of qualified privilege. The said repetition and republication were made under a duty — legal, social and moral to communicate to the state government of Sabah, the authorities charged with the responsibility relating to land matters in Sabah, etc.

In addition the defendants say that the words complained of consists of statements of fact, they are true in substance and governed by s 8 of the Defamation Act 1957 ('the DA 1957'). The defendants assert that the words were published on an occasion of qualified privilege, and are protected by s 12 of the DA 1957 since the words complained of form part of a fair and accurate reporting of the public meeting and are protected by Part II of the Schedule to s 12(2) of the DA 1957.

PRELIMINARIES

[4] Three witnesses gave evidence for the plaintiff and the fourth defendant gave evidence for the defendants. The first defendant was not called by the plaintiff to give evidence. Further, in this case, it is not disputed that the second defendant at the earliest opportunity ie by a letter dated 9 July 1998 had offered to publish statements from the plaintiff in its newspaper so as to afford the plaintiff sufficient and adequate opportunity to explain and/or contradict the words complained of to avail the defence under s 12 of the DA 1957 and the plaintiff has not taken the benefit of the offer in the right perspective.

[5] The law requires before a writ is issued in an action for libel, it must be endorsed with a statement giving sufficient particulars of the publications in respect of which the action is brought to enable them to be identified (see O 78 r 2 of the Rules of the High Court 1980 ('the RHC')). This was also not done in this case. I also note that the plaintiff is claiming excessive sum in damage and has not supported the claim with contemporaneous case laws. On 4 September 2008, parties have informed me that the only issue which I need to deal in the instant case is the statutory defence of qualified privilege, and the defendants had abandoned other defences.

O 78 r 2

[6] On the issue of O 78 r 2, the plaintiff says the writ of summons complied with O 78 r 2 of the RHC and sets out the reason as follows: (i) r 2 states that the writ must be 'indorsed' with a statement giving sufficient particulars of the publications in respect of which the action is brought to enable them to be identified; (ii) what then is the meaning of the word 'indorsed'? That word is found in O 6 r 2 of the RHC governing the issuance

of writ of summons. It states, inter alia, that before a writ is issued, it must be indorsed with a statement of claim or, if a statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby. So, a writ of summons can be issued with a statement of claim, which we normally call a 'special indorsed writ' or alternatively a writ that is not indorsed with a statement of claim that we normally call as a 'general indorsed writ'. In so far as 'general indorsed writ' is concerned, there must be indorsed a concise statement of the nature of claim or the relief or remedy; (iii) in this case, the writ of summons was issued with a statement of claim. The effect of this is that the statement of claim becomes a part of the writ of summons, in addition to being a pleading; the plaintiff relies on the case of *Arab-Malaysian Merchant Bank Bhd v Dominance Resources Sdn Bhd & Anor* [2001] 6 MLJ 715; (iv) the statement of claim is part and parcel of the writ. The particulars that are required by O 78 r 2 of the RHC 1980 so that the publication can be identified are contained in the statement of claim. The defendants never objected that there was a lack of particulars in the statement of claim. And relies on the case of *Chan Kow Chuan v Andrew Kok* [2003] 3 AMR 456 where the attack by the defendants to strike out the plaintiff's claim against them under O 78 r 2 of the RHC was directed at the statement of claim; (v) the rule must be read in conjunction with O 6 r 2 of the RHC. That O 78 r 2 of the RHC only requires that particulars of the impugned of the article must be stated in the writ so as they can be identified by a defendant. That requirement can be achieved in the case of a 'special indorsed writ' through the statement of claim or in a 'general indorsed writ' over and above the requirement stating the general nature of the claim made; additional particulars must be given to identify the impugned publication; (vi) even if there was a defect as regards with the indorsement, it can be cured by a subsequent statement of claim. And relies on the case of *Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd* [1990] 2 MLJ 423; (vii) the defendants suffered no prejudice at all in this case; (viii) further, O 1A and O 2 r 3 of the RHC are to ensure justice is done and not disregarded by a mere technical non-compliance with any of these rules and relies on the case of *Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Ors* [2007] 5 MLJ 339.

The defendants say: (i) O 78 r 2 is a mandatory provision and must be complied with; (ii) O 6 r 2 is a general provision and the principle of *generalia specialibus non derogant* shall apply; (iii) further, an indorsement is different from a statement of claim. An indorsement must be in the writ as stated in Form 2 of the RHC.

[7] I consider the failure to comply with this order is fatal as this is a specific provision and is seen to be a condition precedent to be met with, before the writ of defamation can be issued. Those who file defamation suits are not

allowed to do so in a cavalier manner and this is the effect of O 78 which the court is obliged to give effect. Unlike the general provision for writs, failure of endorsement may not be fatal when the statement of claim is annexed and served on the defendants. However, O 78 r 2 of the RHC is a specific provision as opposed to O 6 r 2 of the RHC. On this issue alone, the plaintiff's suit may be dismissed. However, since the defendants have not taken objection at the commencement of the proceedings, the safer approach for me is to hear the case on merits.

THE DEFENDANTS' ARGUMENT

[8] Learned counsel for the defendants, inter alia, says: (i) s 12 of the DA 1957 extend the common law defence of qualified privilege to such reports and other matters specified in the schedule thereto; (ii) in order for the report to be protected under s 12 of the DA 1957; (a) the report must be a report mentioned in the schedule (s 12(3) of the DA 1957); (b) it must not be a publication of matter which is blasphemous, seditious or indecent, or the publication of which is prohibited by law (s 12(3) of the DA 1957); and (c) the matter reported must be of public concern and for the public benefit (s 12(3) of the DA 1957); (iii) the reports listed in the schedule to s 12 of the DA 1957 include, inter alia:

> A fair and accurate report of the proceedings of any public meeting held in Malaysia.

(iv) the privilege extended by s 12 of the DA 1957 to all reports listed in the schedule is only a qualified one. Therefore, if the publisher can be shown to have been actuated by express malice, the privilege will be lost (s 12(1) of the DA 1957); (v) the next issue to be considered is whether the impugned article is 'a fair and accurate report of the proceedings of any public meeting held in Malaysia'. The phrase 'public meeting' is defined in s 2 of the DA 1957 as 'a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern whether the admission to the meeting is general or restricted'.; (vi) in order to determine whether the impugned article was a report of the proceedings of any 'public meeting'. In the instant case, it is necessary to look at the pleadings of the parties to see whether the parties' pleas are at variance on this issue; (vii) by virtue of their respective pleadings, that the occasion was in fact a public meeting within the meaning of the definition of public meeting appearing in s 2 of the DA 1957. Further, based on the pleadings itself, the meeting in question was 'bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern'; (viii) whether the impugned article was published and printed with malice as to defeat the defendants' defence of statutory qualified privilege under s 12 of the DA 1957; (ix) the plaintiff has not adduced any evidence to support the charge

that the defendants had published the words complained of in the impugned article with improper motives or personal spite or ill-will towards the plaintiff or that they knew that the impugned article would cause distress, humiliation and anguish to the plaintiff and his family, the existence of which would have at least come within the scope of 'express malice'; (x) even if the plaintiff is able to establish proof of actual or express malice against the first defendant, it would not defeat the plea of qualified privilege of the defendants since the malice of one defendant does not infect the other co-defendants as there can be no transferred malice and relies on the case of *Lee Kuan Yew v Derek Gwyn Davies & Ors* [1990] 1 MLJ 390;(xi) in the circumstances, the plaintiff has failed to discharge the burden of proof on him to establish express malice on the part of the defendants; as such the impugned article is thereby protected by statutory qualified privilege under s 12 of the DA 1957.

Learned counsel for the defendants say in the event that the plaintiff succeeds on liability: (i) the basis on which the plaintiff is seeking such huge amount of damages against the defendants in essence relates to their alleged failure to verify the contents of the words complained of. In other words, the plaintiff is claiming that the defendants acted recklessly and/or carelessly in publishing the impugned article. This should be contrasted with the plaintiff's basis for claiming huge amount of damages against the first defendant which is grounded on the words complained of lowering the plaintiff's character, credit and reputation as a person, businessman, politician and/or acting President of Bersekutu. Comparatively, the plaintiff's grounds against the first defendant is far more substantive and serious and yet the plaintiff accepted a sum of RM50,000 as full and final settlement of his claim against the first defendant and this is a relevant factor to be taken into consideration by the court; (ii) in claiming damages against the defendants, the plaintiff has pleaded that the words complained of would cause distress, humiliation and anguish to him and his family and by reason of failure to apologise to him; (iii) damages are generally awarded on a modest scale influenced by the facts and circumstances of the specific case and relies on the case of *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161. For a brief period from 1995–2001, Malaysian courts awarded huge amounts of damages, a trend which was set when the Court of Appeal and, subsequently, the Federal Court, affirmed the trial judge's award of RM10m in damages in favour of Vincent Tan in *Tan Sri Dato Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors* [1995] 1 MLJ 39. The Court of Appeal in *Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385 distinguished the Vincent Tan's award and held that the appellate courts' affirmation of the award did not entitle every plaintiff to an award of millions of ringgit and the Court of Appeal then went on to reduce the High Court award of RM1m in that case to RM100,000; (iv) in *Karpal Singh a/l Ram Singh v DP Vijandran*, the Court of Appeal noted that the highest award ever made in Malaysia prior to the Vincent Tan's award was RM100,000 and that the Vincent Tan award was

'an isolated pinnacle in an otherwise undulating plain'. It also went on to hold that it is the principle in assessing damages and not the amount which is binding. The Court of Appeal went on to reduce the trial court's award of RM500,000 to RM100,000; (v) the trend of making huge awards was thus checked leading to a reversal by the Court of Appeal of a number of exorbitant awards made by the High Court. In *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar* [2001] 3 CLJ 161, the Court of Appeal reduced the award from RM3m to RM500,000. In *Joceline Tan Poh Choo & Ors v V Muthusamy* [2003] 4 MLJ 494, the Court of Appeal reduced the award of RM300,000 to RM100,000. In *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494, the Court of Appeal reduced the award of RM1.5m to RM200,000. In *Utusan Melayu (M) Bhd & Ors v Tjanting Handicraft Sdn Bhd & Anor* [2005] 2 MLJ 397, the Court of Appeal reduced the award of RM1.3m to RM250,000; (vi) in the light of the current trend as reflected by the reversal of exorbitant awards, the court ought to disregard the exorbitant sums claimed by the plaintiff; (vii) the plaintiff is also seeking aggravated and exemplary damages. On the facts of the present case, aggravated and exemplary damages do not arise. The learned authors of *Evans on Defamation in Singapore and Malaysia* (3rd Ed) at p 191 say that aggravated damages would only arise where the defendant's conduct has aspects of 'high-handedness, oppressiveness, or is insulting or contumelious'. The pleaded case of the plaintiff against the defendants does not in any way indicate that their conduct has aspects of 'high-handedness, oppressiveness, or is insulting or contumelious'; (viii) as for the plaintiff's claim for exemplary damages, it is submitted that such damages would most likely be awarded only in circumstances where the plaintiff is able to establish that the defendants had deliberately or recklessly published a libel with the knowledge that the chances of economic advantage from publication outweigh any sum for which they might be held liable for damages (see *Chin Choon Chin Tee Fut v Chua Jui Meng*). In the circumstances, the mere fact that the publication is made in the course of carrying on a business or profit is not enough to justify an exemplary damage award; (ix) if the court is of the view that the plaintiff had succeeded in establishing liability against the defendants, the plaintiff would only be entitled to compensatory damage which would include any actual and anticipated pecuniary loss, any resultant social disadvantage, and compensation for the natural grief and distress which the plaintiff might feel as a result of the impugned article and relies on the case of *Datuk Patinggi Abdul Rahman Ya'kub v Abang Mohammad bin Abang Anding* [1979] 2 MLJ 185.

THE PLAINTIFF'S ARGUMENT

[9] Learned counsel for the plaintiff, inter alia, says:(a) the relevant provisions in s 12 of the Defamation Act 1957 ('the Act') provide as follows:

12 Qualified privilege of newspapers

(1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the schedule to this Act shall be privileged unless the publication is proved to be made with malice.

(2) In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances

(3) Nothing in this section shall be construed as protecting the publication of any blasphemous, seditious or indecent matter or of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.

(b) The statutory defence of qualified privilege of s 12 of the Act does not apply to a reporting of an alleged public meeting under Part 2 of the Schedule of the Act, because s 12(1) only provides the statutory defence to reporting of matters covered under Part 1 of the schedule. The heading of s 12 cannot be read in this instance to assist in the interpretation in view of the plain meaning of the words in s 12(1); (c) s 12(2) of the Act which refers specifically to reports mentioned in Part 2 of the Schedule provides that 'the provisions of this section shall not be a defence ...' But there is no other provision in this section which provides such a defence for reports or matters specified in Part 2. There is a lacuna here. And that lacuna can only be filled by Parliament. The English equivalent of s 12(1) of the Act is s 7(1) of the UK Defamation Act 1952 but with a difference. It reads as follows:

> (1) subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the schedule to this Act shall be privileged unless the publication is proved to be made with malice.

(d) there is only one case in Malaysia reported in MLJ which looks at s 12. That case is *DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22. The learned trial judge there did not have to deal with this issue. He merely held that a press statement does not come within the schedule in the Act; (e) we concede that *Berita Harian* is a newspaper within s 12 of the Act. However the issues here are: (i) applicability of s 12 of the Act; (ii) in this regards whether the article was a report of the proceedings of a public meeting; (iii) if so, whether the report was fair and accurate; (iv) whether the report was for

a matter which is of public concern and the publication of which is for public benefit; (v) if the statutory defence of qualified privilege is available, whether the publication was published with malice; (f) the plaintiff asserts the defendants have not proved the existence of a public meeting; (g) the defendants have not shown any evidence to show that the impugned article was a fair and accurate reporting of the proceedings of the alleged public meeting.

In respect of damages, the plaintiff says: (i) the plaintiff in this case claims against the defendants for compensatory damages, aggravated damages and exemplary damages (ii) in cases of libel, the plaintiff need not prove actual damage for 'the law presumes that some damage will flow into the ordinary course of things from the mere invasion of his absolute rights to reputation'. And 'there is no obligation on the plaintiffs to show that they have suffered actual damage ... In every case a plaintiff is entitled to say that there has been a serious libel upon him, that the law assumes he must have suffered damage, and that he is entitled to substantial damage' (see *Gatley on Libel and Slander* (10th Ed), para 32.45); (iii) in assessing damages, the court would naturally be governed by all the circumstances of the case; (iv) the factual matters to be looked at have been succinctly encapsulated in para 1451 of *Gatley on Libel and Slander* (8th Ed), which says:

> They are entitled to take into consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and 'the whole conduct of the defendant from the time when the libel was published to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action,' and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow 'for the said truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused'. They should also take into account the evidence led in aggravation or mitigation of the damages.

(iv) the court can also take into consideration any mental distress or illness caused to the plaintiff as a result of the publication, (see para 1461 of *Gatley on Libel and Slander* (8th Ed)); (v) that in assessing damages, previous cases can only be used as a guide.

[10] I have heard the evidence, read the documents and submissions filed in detail. I take the view that the plaintiff's action for defamation must be allowed. My reasons are as follows:

(i) It is my finding that the words complained of were defamatory of the plaintiff as alleged by the plaintiff within the correct test as expounded by various cases, namely whether the words complained of were calculated to expose the plaintiff to hatred, ridicule or contempt in the

minds of reasonable men or whether they would tend to lower the plaintiff in the estimation of right thinking members of society generally (see *Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya'kub* [2005] 3 MLJ 485; [2005] 2 CLJ 645).

(ii) I disagree with the plaintiff's contention that the statutory defence of qualified privilege does not apply to a reporting of an alleged public meeting under Part 2 of the Schedule of the Act. Section 12(1) says, that subject to the provision of this section and the other two parts of the sentence is disjunctive, and the distinction in Part 1 and Part 2 of the Schedule is quite obvious and self explanatory.

(iii) The defendants are entitled to the statutory defence of qualified privilege. In the instant case, the defendants are news publishers. Their rights, privileges, immunities are quite different from any commercial organisations or private persons newspapers are ordinarily expected to report contemporary events of public interest or of public concern which is often liberally construed by courts. In this context, news is defined by *The Concise Oxford Dictionary* as information about important or interesting recent events. That is to say, in our context what the newsman sees or hears from the original source in relation to publication. The truth per se is not material but the fact that such things were said in appropriate occasions by the maker may give the news media the right to publish the same. However, the law will penalise certain category of news if published wrongfully. This has been documented in various cases where the recognised defence in this area of law is now well established. It is trite the categories of qualified privilege are not closed. In England, the courts quiet recently has introduced a new caption referred to as 'reportage' though it is nothing more than an extension of existing principles or guidelines in this area of law. The English Court of Appeal in the case of *Chaman v Orion Group Publishing* [2007] EWCA Civ 972, made the following observation:

> Common Law Privilege
>
> Before I endeavour to apply the principles set out above to the facts of the present case, there are a number of general observations which need to be made. The first is that I readily accept that the problem of corruption within a police force is a matter of grave public concern. Particular case histories, of which *Brennan* is one, are equally of legitimate public interest. This was common ground between the parties.
>
> Part of the underlying purpose of the House of Lords in *Reynold* is effecting a change to the common law defence of qualified privilege was to reflect the concern felt in some quarters that a greater degree of freedom of publication was required in regard to the reporting of matters of public interest in circumstances where the defendant publisher was unable to prove the truth

of what the intended to publish. The House of Lords adopted as a new criterion of privilege the test of responsible journalism. It is well known that hither to the defence of privilege based on responsible journalism has failed more often than it has succeeded. I accept that the court must be on its guard not to set an unrealistically high standard of journalism or authorship. I bear in mind what Lord Nicholl said in *Reynolds* at p 202:

> The common law does not seek to set a higher standard than that of responsible journalism, as standard the media themselves espouse.

An unusual feature of the present case is that McLagan laid great stress both in his witness statement and in his oral evidence upon the fact that *Bent Copper* is, as he put it, a balanced and non-partisan account of the public dispute between CIB on the one hand and *Charman* and *Redgrave* on the other, based on material the public domain. I will shortly have to decide if those claims are made out. It seems to me, however, that before I address those issues I should first consider whether, as McLagan claims, the passages of which *Charman* complains constitute 'reportage' in the sense in which that term is used in *Al-Fagih* and later cases. If those passages do constitute reportage, the requirements of responsible journalism are or maybe significantly relaxed.

In *Al-Fagih* Simon Brown LJ described reportage as 'a convenient word to describe the neutral reporting attributed allegations rather than their adoption by the newspaper'.

The court held that in such a situation the public was entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other.

(iv) It is my finding that the evidence and pleadings show that there was public meeting. The definition of public meeting in s 2 of the DA 1957 is not restrictively worded. It is a judicial trend now that news organisations have been given greater protection against libel actions. In *Turkington & Ors (Practising as McCartan Turkington Breen) v Times Newspapers Limited (Northern Ireland)* unreported, 2 November 2000, the House of Lords ruled that the newspapers could rely on the defence of qualified privilege if they carried accurate reports of news release issued at press conferences and the phrase public meeting was liberally construed. Lord Bingham of Cornhill opined:

> I am of the clear opinion that the press conference held on 23 January was a public meeting within the meaning of s 7 and para 9. I reach that conclusion for these reasons:
>
> (1) In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The

majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.

(2) In the present case the role of the press is different. It is that of reporter. The press then acts, in a very literal sense, as a medium of communication …

(3) The effect of the legislation in 1955 was to grant qualified privilege to newspaper reports of public meetings, subject to the stringent conditions just noted. This grant (as in 1881, 1888 and 1952) must have been intended to enable citizens to participate in the public life of their society, even if only indirectly, in an informed and intelligent way. since very few people could personally witness any proceedings or attend any meeting in question, it was intended to put others, by reading newspaper reports, in a comparable position. The privilege was not extended to newspaper reports of the proceedings of private bodies and private meetings, because those are proceedings which by definition the public do not witness and to which the public do not have access: the object was not to put the newspaper reader in a better position than one who was able to attend the proceedings or meeting in person.

(4) Although the 1955 reference to 'public meeting' derives from 1888, it must be interpreted in a manner which gives effect to the intention of the legislature in the social and other conditions which obtain today... Thus 'public', a familiar term, must be given its ordinary meaning. A meeting is public if those who organise it or arrange it open it to the public or, by issuing a general invitation to the press, manifest an intention or desire that the proceedings of the meeting should be communicated to a wider public. Press

> representatives may be regarded either as members of the public (as made clear by the language of para 10 of the Schedule) or as the eyes and ears of the public to whom they report. A meeting is private if it is not open to the members of the public and if it is not intended that the proceedings of a meeting should be communicated to the public, unless perhaps by the body which holds the meeting... A press conference, attended by members of the press and perhaps other members of the public, has become an important vehicle for promoting the discussion and furtherance of matters of public concern, and there is nothing in the nature of such conference which takes it outside the ordinary meaning of 'public meeting'.

(v) It is my finding that the defendants had not satisfied according to law that it was a fair and accurate reporting as set out in Part 2 of the Schedule of the DA 1957. In that context the plaintiff succeeds and the defendants' defence of qualified privilege under s 12 of the DA 1957 fails. When statutory defences are available each and every element of the defence must be established according to law. The DA 1957 does not define 'fair and accurate reporting' and the defendants have not gone to show that it was fair and accurate reporting. Merely, reporting matters which can prima facie be seen objectively as defamatory cannot be said to be fair if the accuracy of the report is not verified by the publishers. Further, in the context of responsible journalism even though the statement is accurate there may be a duty to edit the report where necessary to reflect fairness. It all depends on the facts of the case, and the nature of the allegation. In the instant case, I also find no evidence of malice. In *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 Gopal Sri Ram JCA observed:

> A newspaper has the right, and no greater or higher right, to make comment upon a public officer or person occupying a situation than an ordinary citizen would have. Indeed, by reason of their capability to formulate and influence public opinion, those having control over the dissemination of news or views, whether by means of the print or electronic media, should act responsibly. Where publication is said to be factual, they must ensure that the facts they make available to their readers, listeners or viewers are true.

(vi) On the issue of quantum of damages, I agree with the plaintiff's submission in assessing damages that the court can take into consideration the circumstances of the case and that the previous cases can only be a guide. In this case, what is not in dispute is that the slanderous statement if any, originates from the first defendant,

and the matter has been settled out of court. Further, the defendants have written a letter to afford the plaintiff sufficient and adequate opportunity to explain and/or contradict the words complained of. The plaintiff had not taken the offer. This shows the defendants' sincerity in correcting the error and to some extent destroys any argument in respect of malice. In actual fact if the reporting is not fair and accurate the plaintiff is given the opportunity under s 12(2) of the DA 1957 to request the defendants to correct the report. That too the plaintiff did not do. Further, the plaintiff's claim for quantum of damages is an unprecedented amount and is not supported by authority. In consequence, I agree with the counsel for the defendants that damages in this case must not be substantial. Taking all factors into consideration, I take the view that a sum of RM50,000 will be a fair sum in respect of damages.

[11] For reasons stated above, I allow the plaintiff's claim and order the second to fifth defendants to pay damages in the sum of RM50,000 with interest at 8%pa from the date of judgment until the date of realisation with costs. As parties have agreed to a fixed cost of RM100,000, it is ordered that the second to fifth defendants to pay the costs of RM100,000 to the plaintiff.

I hereby order so.

Plaintiff's claim allowed on the merits.

Reported by Andrew Christopher Simon